

IP 07-1405-C h/1 Nesses v. Wal-mart
Judge David F. Hamilton

Signed on 06/09/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JERRY NESSUS,)	
ANGELA MANAWAT,)	
)	
Plaintiffs,)	
vs.)	NO. 1:07-cv-01405-DFH-WTL
)	
ASSOCIATES' HEALTH AND WELFARE)	
PLAN,)	
WALMART STORES, INC.,)	
THE PRUDENTIAL INSURANCE)	
COMPANY OF AMERICA,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JERRY NESSES ¹ and ANGELA)	
MANAWAT,)	
)	
Plaintiffs,)	
)	
v.)	
)	CASE NO. 1:07-cv-1405-DFH-WTL
ASSOCIATES' HEALTH AND WELFARE)	
PLAN d/b/a WAL-MART HEALTH AND)	
WELFARE PLAN, et al.,)	
)	
Defendants.)	

ENTRY ON MOTION TO DISMISS

Fe Nesses worked for Wal-Mart. She died on October 30, 2005, apparently resulting from complications (infection and multiple organ failure) from abdominal surgery performed in September 2005. As an employee of Wal-Mart Mrs. Nesses was covered by life insurance. Policy benefits totalling \$100,000 were paid to plaintiffs Jerry Nesses and Angela Manawat in December 2005. In October 2007, Mr. Nesses and Ms. Manawat filed this suit alleging that the actual benefits should have been greater. They waived as defendants the employee benefit plan, Wal-Mart Stores, Inc., Prudential Insurance Company of America, Inc., and the Metropolitan Life Insurance Company.

¹The parties agree that plaintiff's last name is spelled Nesses. The court has amended the caption accordingly.

Defendant Prudential has moved to dismiss for failure to state a claim upon which relief can be granted and for failure to exhaust administrative remedies. Defendants Wal-Mart and the plan have endorsed the exhaustion defense but disagreed with Prudential's first argument, which tries to put the onus on Wal-Mart and the plan in case a mistake was made.

Prudential's brief refers to Rule 12(b)(1) and Rule 12(b)(6). Rule 12(b)(1) does not come into play. The court has subject matter jurisdiction because plaintiffs' claims arise under ERISA. Prudential's arguments go to the merits of those claims and to exhaustion of administrative remedies, neither of which affects the court's subject matter jurisdiction.

Prudential's argument for dismissal on the merits relies not on the complaint and attached documents but upon Prudential's assertions about the information it received from the other defendants. In ruling on a motion under Rule 12(b)(6), the court simply may not rely on such matters outside the complaint.

The argument for failure to exhaust administrative remedies is more persuasive. Under ERISA, the district court has discretion to require exhaustion of available administrative remedies. *Robyns*, 130 F.3d 1231, ___ (7th Cir. 1997). In most cases, such exhaustion should be required. Plaintiffs argue that exhaustion should not be required because the plan document provides for

appeals “If your claim for benefits is denied. . . .” Plaintiffs point out that they were not denied benefits, but received them. They dispute the amount.

It is not entirely clear whether the plan would entertain an appeal by plaintiffs at this time. The court will exercise its discretion to STAY this action for a period of 90 days. That should give plaintiffs time to file an administrative appeal of the calculation of the life insurance benefits (and the sooner the better), and should give the plan up to 45 days to act on the appeal. See Prudential Exhibit B at 13. If the plan deems the appeal untimely, the court will later revisit the consequences of the plan document’s reference to appeals “If your claim for benefits is denied. . . .”

One last point deserves attention. Prudential asserts, without citing authority, that plaintiffs somehow lost their right to assert their claims by cashing the checks for death benefits back in December 2005. Prudential has not offered evidence of a release or other indication that plaintiffs’ acceptance of undisputed benefits should amount to a waiver or estoppel regarding additional disputed amounts.

So ordered.

Date: June 9, 2008

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

Copies to:

Edna Sybil Bailey
WILSON ELSEER MOSKOWITZ EDELMAN & DICKER
edna.bailey@wilsonelser.com

Malcolm Brown Futhey III
LAWRENCE & RUSSELL, LLP
malcolmf@lawrencerussell.com

Daniel John McMahon
WILSON ELSEER MOSKOWITZ EDELMAN & DICKER, LLP
mcmahond@wemed.com

D. Lance Wittry
WITTRY & WITTRY LAW OFFICE
lance@lawyerindiana.com